IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

CONSOLIDATION COAL COMPANY, UNITED STATES STEEL CORPORATION, YOUNGSTOWN MINES CORP., EASTERN ASSOCIATED COAL CORP., STERLING SMOKELESS COAL COMPANY, OLGA COAL COMPANY, and RANGER FUEL CORPORATION, Petitioners

v.

DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, ELMER BROWN, FRED COGAR, ROMA COOK, BERNARD "RED" COX, LEVI DANIEL, JIMMY ELLIS, LEON FOLEY, JOHN GUZEK, JAMES KIDD, JOHN MENDEZ, GEORGE MOUNTS, ROBERT PAYNE, CLIFFORD RATLIFF, HERBERT J. ROGERS, JAMES S. ROGERS, STANLEY RYNKIEVICH, ROBERT SHORES, JAMES TURNSTALLE, DAVID WHITLACH, JACK WILLIAMS and DONALD YOHO, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDICES

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CONSOLIDATION COAL COMPANY, UNITED STATES STEEL CORPORATION, YOUNGSTOWN MINES CORP., EASTERN ASSOCIATED COAL CORP., STERLING SMOKELESS COAL COMPANY, OLGA COAL COMPANY, and RANGER FUEL CORPORATION, Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDICES

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review judgments of the United States Court of Appeals for the Fourth Circuit, entered May 12, 1971, affirming and modifying an order of the United States District

Court for the Southern District of West Virginia[1] and vacating and remanding an order of the United States District Court for the Northern District of West Virginia,[2] both of which orders had entered injunctions against Respondents and others.

OPINIONS BELOW

The Opinion of the Fourth Circuit is not yet reported and is reprinted as Appendix A hereto, p. 1a. The Opinion of the Southern District Court, together with Findings of Fact and Conclusions of Law, is unreported and is reprinted as Appendix B hereto, p. 21a. The injunction Order of the Southern District Court is reprinted as Appendix C hereto, p. 38a. Excerpts from the Transcript of Proceedings in the Northern District Court are reprinted as Appendix D hereto, p. 43a. The Order of the Northern District Court is reprinted as Appendix E hereto, p. 56a.

JURISDICTION

The judgments of the United States Court of Appeals for the Fourth Circuit were entered on May 12, 1971, at No. 15,402 therein, affirming and modifying the order of the Southern District Court, and at No. 15,173 therein, vacating and remanding the order of the Northern District Court.

The jurisdiction of this Honorable Court in invoked under 28 U.S.C. Section 1254(1).

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1. Hereinafter "Southern District Court."
2. Hereinafter "Northern District Court."

QUESTIONS PRESENTED

In No. 15,402

1. Whether the Learned Court below decided a federal question in a way in conflict with prior applicable decisions of this Honorable Court when it held that unlawful activities in restraint of interstate commerce and tortious interference with contract rights are protected by the First Amendment, provided only that they do not involve picketing, force, or violence.

In No. 15,173

1. Whether the order of the Northern District Court is a valid exercise of the inherent power of a federal court, in an emergency situation, to control litigation pending before it, to prevent violations of law and irreparable injury, and to preserve the status quo and its own jurisdiction pending further proceedings.

2. Whether Respondents, who appealed an Order which the Northern District Court had entered to preserve the status quo pending further hearing, where the appeal itself deprived the District Court of jurisdiction to hold a further evidentiary hearing, may have the Order vacated on grounds that it was not supported by sufficient evidentiary hearing.

CONSTITUTION AND STATUTES

United States Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1. Trusts, etc. in restraint of trade illegal . . . .

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

28 U.S.C. § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . . June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

STATEMENT OF THE CASE

In No. 15,402

Petitioners operate coal mines in southern West Virginia. (Jt. App. p. 260a).[3] Petitioners' mines were picketed and forced to close from June 20 to June 24, 1970. (Jt. App. pp. 260a-261a). The activities causing the shutdown were instigated and carried out by disabled miners, widows, and other individuals and groups, including Respondents herein, for the purpose of obtaining increased benefits from the United Mine Workers of America Welfare and Retirement Fund (hereinafter called "Fund"). (Jt. App. p. 265a). The Fund is an independent trust administered by independent trustees, over whom Petitioners have no control or right of control. (Jt. App. p. 264a). Petitioners were not involved in any dispute or controversy with their employees, the United Mine Workers of America, the Fund or its trustees, or the disabled miners and widows. (Jt. App. pp. 264a, 265a). Respondents picketed and closed Petitioners' mines in an attempt to cause sufficient economic harm throughout the United States to force the trustees to liberalize benefits from the Fund. (Jt. App. p. 265a).

This course of conduct was decided upon and planned prior to June, 1970, at a series of weekly meet-

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3. Herein, the indication, for example, "Jt. App. p. . . . ." refers to the Joint Appendix in the United States Court of Appeals for the Fourth Circuit, which has been or will be certified by the Clerk of such Appellate Court and submitted to this Court. Reference to the Appendices attached to this Petition shall be referred to, for example, as "App. A p. . . . a." or "App. B p. . . . a."

ings held in various small towns in southern West Virginia, attended by disabled miners, widows and others. (Jt. App. pp. 309a-337a). These meetings were called and conducted primarily by Respondent Robert Payne, President of Respondent Disabled Miners of Southern West Virginia, an unincorporated association whose objective is to obtain liberalized benefits from the Fund. (Jt. App. pp. 309a-337a).

Respondents' plan, and the success of that plan, are best understood in light of the history, traditions, and practices of the coal industry. The early, turbulent days of union organization in the coal fields brought with them the concept of total solidarity. A miner who crossed a picket line was a "scab" and was subject to social ostracism and, frequently, to violent retribution. (Jt. App. pp. 566a-569a; 581a-584a). This solidarity goes far beyond formal deference to picket lines. "The word" from someone appearing to be a spokesman is sufficient to cause a work stoppage. A quasi-authoritative statement or intimation that "the men are staying out" will close the mines as effectively as will a picket line. This is particularly true when a work stoppage has been initiated in part by picketing, force or violence. Once these tactics have been employed to cause a shutdown, it is not necessary thereafter to resume picketing in order to close the mines again. Cajolery, moral suasion, and incitement are sufficient to induce the miners to go off the job again. (Jt. App. pp. 569a-570a).

Thus Respondents, through meetings, publicity, appeals for solidarity, threats, patrolling, picketing and "passing the word", were able to close down Petitioners' mines, causing loss of wages to employees, depriving industry and public utilities of needed coal, and causing

permanent harm to inactive mines. (Jt. App. pp. 265a-267a).

After four days the disabled miners ceased picketing, but threatened to resume in July if their demands respecting the Fund were not met. Open threats to shut down the mines again were made by Payne and others at meetings, in the press and on television. (Jt. App. pp. 334a-343a; 580a-581a). In July, 1970, when a resumption of picketing became imminent, Petitioners commenced actions in the Southern District Court, at Bluefield, seeking injunctive relief, alleging an unlawful conspiracy in restraint of interstate commerce and a tortious interference with the contractual relationships between Petitioners and their employees. (Jt. App. pp. 32a-44a). Temporary restraining orders were issued (Jt. App. pp. 279a-295a), and the actions were consolidated for hearing. Hearings continued through most of July and August.

On September 8, 1970, the Southern District Court issued its Opinion, Findings, and Conclusions, supporting Petitioners' contentions. (App. B p. 21a). On September 16, the Court issued the injunction as set forth in App. C. p. 38a.

The injunction restrained Respondents and others from "picketing *or in any other manner interfering with*" operations at Petitioners' mines and from "coercing *or otherwise inducing*" employees of Petitioners to withhold their services. (emphasis added).

On September 24, 1970, Respondents filed Notice of Appeal. On appeal, the United States Court of Appeals for the Fourth Circuit modified the injunction, deleting the language italicized above. (App. A p. 13a).

In No. 15,173

By August, 1970, the injunction proceedings and related contempt proceedings in the Southern District Court had virtually stopped the illegal activities of the disabled miners. The disabled miners thereupon evidently decided to circumvent the jurisdiction of the Southern District Court by moving their activities into the Northern District of West Virginia. On August 11 and 12, 1970, pickets appeared at and shut down mines of Petitioner Consolidation Coal Company (hereinafter called "Consol") and of another coal company not a party herein. One of these pickets was Lewis Coleman, a disabled miner who resides in the Southern District and who was subsequently held in contempt by the Southern District Court for picketing in violation of that Court's restraining order. (Jt. App. pp. 299a-301a).

On August 14, 1970, Petitioner Consol commenced an action in the Northern District Court, substantially similar to the actions in the Southern District Court. (Jt. App. pp. 1000-1014a). From the outset, and throughout these proceedings, Consol contended that the action in the Northern District Court was related to and ancillary to the action in the Southern District Court, in that the activities complained of in the Northern District Court were a continuation and extension of the same conspiracy which gave rise to the proceedings in the Southern District Court. The Northern District Court was in substantial agreement, in that it regarded the testimony and adjudications in the Southern District as relevant to its own proceedings. (Jt. App. p. 1001a).

The Northern District Court issued a restraining order and scheduled a hearing for August 24. On Au-

gust 24 the Court extended the restraining order for good cause shown until 5:00 p.m. September 3 and scheduled a hearing for 1:30 p.m. on that date.

On September 3, Petitioner Consol appeared at the hearing and was prepared to present at least ten witnesses. (App. D p. 44a). However, the Court was able to hear the testimony of only one witness. Throughout the hearing, Petitioner Consol made clear its desire to present all its witnesses, to enable the Court to hear all the evidence, and to complete the hearing. However, as the 5:00 p.m. time for the expiration of the restraining order drew near, the Court, on its own motion, issued an Order (App. E p. 56a) extending the restraining order, entering an injunction and, despite Petitioner Consol's willingness to proceed then and there to conclusion (App. D pp. 54a-55a), scheduled further hearing for September 8.

The Court's own schedule, the advanced hour and the impending expiration of the restraining order evidently caused the Court to forego a full hearing and adjudication on September 3. The Order of September 3 was entered to prevent unlawful acts and irreparable injury, to maintain the status quo, and to preserve the Court's jurisdiction until it could adjudicate the matter. (App. D pp. 51a-54a). Petitioner Consol did not move the Court to extend the restraining order or to enter the order it did; rather, the Court did so on its own motion. The action of the Court in scheduling a further evidentiary hearing for September 8 indicates that its Order of September 3 was not a preliminary injunction within the meaning of Rule 65 of the Federal Rules of Civil Procedure. With full knowledge of the Court's in-

tention to hear further evidence, Respondents, on or about September 4, filed a Notice of Appeal from the Order of September 3, thereby divesting the Court of jurisdiction and precluding a full and complete adjudication of the matter. (Jt. App. pp. 1017a-1019a).

On appeal the United States Court of Appeals for the Fourth Circuit vacated the order of September 3, 1970. (App. A pp. 19a-20a).

REASONS FOR GRANTING THE WRIT

In No. 15,402

1. The Learned Court below decided a federal question in a way in conflict with prior applicable decisions of this Honorable Court when it held that unlawful activities in restraint of interstate commerce and tortious interference with contract rights are protected by the First Amendment, provided only that they do not involve picketing, force, or violence.

The injunction issued by the Southern District Court prohibited Respondents from "[p]icketing or in any other manner interfering" with the operation of Petitioners' coal mines, and from "[c]oercing or otherwise inducing employees of Petitioners from withholding their services." The Learned Court of Appeals held that the "any other manner" and "otherwise inducing" portions of the injunction impaired Respondents' rights under the First Amendment. The Learned Court thereupon concluded that only "picketing or employing force or violence" may be enjoined.

The essence of the Learned Court's holding is that Respondents are free to interfere with the operation of Petitioners' mines, to restrain interstate commerce, and to tortiously interfere with contract rights, provided only that Respondents do not use picketing, force, or violence. The Learned Court reaches this result by holding, in effect, that all other forms of activity are protected by the freedom of speech clause of the First Amendment.

It is submitted that this holding conflicts with the applicable decisions of this Court.

Reasons For Granting the Writ.

This Honorable Court has long held that speech is subject to reasonable regulation to protect the rights of others. *Schenck v. United States,* 249 U.S. 47 (1919). In *Giboney v. Empire Storage and Ice Co.,* 336 U.S. 490 (1949), this Court said:

> "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because that conduct was in part initiated, evidenced, or carried out by means of language, whether spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Id.* at 502.

That the exercise of free speech is no justification for the violation of the rights of others was made abundantly clear by this Honorable Court in *Adderly v Florida,* 385 U.S. 39 (1966):

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases the petitioners rely on, Cox v. Louisiana, supra, 379 U.S. at 554-555 and 564-65, 13 L. Ed 2d at 484 and 491. We reject it again." *Id.* at 47-48 (footnote omitted).

In *Konigsberg v. State Bar of California,* 366 U.S. 36 (1961), this Honorable Court clearly rejected the

absolutist view of the First Amendment and held instead that the constitutional protections of speech and association must be considered together with the respective interests involved.

The constitutionality and propriety of an injunction substantially the same as that issued by the Southern District Court in the instant case was upheld in *Douds v. Local 1250,* 170 F.2d 700 (2d Cir. 1948). In that case, a preliminary injunction prohibited a union and named individuals from not only picketing, but also from inducing employees to participate in an unlawful strike and from visiting the homes of employees for the purpose of so inducing them. The Court said that:

> "[I]t cannot be reasonably contended that the preliminary injunction improperly interferes with the rights of . . . free speech." *Id.* at 701.

The distinction made by the Learned Court of Appeals in the instant case, between picketing, force, and violence, on the one hand, and all other activities, on the other, is in conflict with the decision of this Honorable Court in *Giboney v. Empire Storage and Ice Co., supra.* In *Giboney,* a union and various individuals sought, in violation of a state antitrust statute, to induce a wholesaler not to sell to nonunion retailers. To this end, the union developed and carried out a program of publicity, warnings, patrolling, and picketing. In most instances, the union relied upon speaking and writing. The union maintained that its activities were protected by the freedom of speech clause of the First Amendment and that, even if the picketing was not protected, at least, the other activities were so protected.

This Honorable Court said:

> "[T]he record here does not permit this publicizing to be treated in isolation . . . . [T]he sole immediate object . . . was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellant's activities — their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing — *constituted a single and integrated course of conduct,* which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law . . . .
>
> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." *Id.* at 498 (emphasis added).

The pleadings, evidence, and findings in the instant case show that Respondents and others conspired to shut down Petitioners' mines and "turn out the lights" in the United States. Respondents carried out their conspiracy through a combination of moral suasion, cajolery, incitement, force and violence, and spread their message through the mass media, picketing, word-of-mouth, and innuendo, to effectuate their unlawful conspiracy. Thus, Respondents had clearly embarked upon an integrated course of conduct in furtherance of an unlawful conspiracy. Given the peculiar facts of this case and the history and traditions of the coal industry, the activities of Respondents, with or without picketing,

force, and violence, are sufficient to perpetuate or reinstitute the work stoppage.

Therefore, it is submitted, the Learned Court of Appeals departed from applicable decisions of this Honorable Court in that it failed to treat Respondents' activities as an integrated course of conduct in furtherance of an unlawful conspiracy, and in that it held Respondents' activities in furtherance of that conspiracy to be constitutionally protected.

In No. 15,173

1. The judgment of the Learned Court below raises serious questions as to the jursidiction and authority of the United States District Courts.

The order entered September 3, 1970, by the Northern District Court was not a preliminary injunction within the meaning of Rule 65 of the Federal Rules of Civil Procedure. Rather, it was an exercise of the inherent power of a federal court to act, in an emergency situation, to control litigation pending before it, to prevent illegal acts and irreparable injury, and to preserve the status quo and its own jurisdiction pending further proceedings.

At the time the order was entered, the Court felt that it could not then and there proceed with the hearing on Petitioner's motion for preliminary injunction. The Court's own schedule and the late hour and the impending expiration of the restraining order evidently caused the Court, on its own motion, to enter its Order and to set September 8 as the date for further hearing on the motion for preliminary injunction.

Based on the litigation in the Southern District Court, the uncontradicated complaint and affidavits of

Petitioner, and the testimony already presented, the Northern District Court believed that Consol's mines had been picketed and that the irreparable injury would be likely to occur before it could hear and adjudicate the matter fully. Thus, the Court intended to maintain the status quo until September 8.

It has long been established that a federal district court may issue any writ necessary and appropriate to preserve its jurisdiction over the parties to a cause or over the cause itself, provided that the writs comply with the principles and usages of law. This is an inherent power in the courts. As is stated in *Strohbar v. Dwinnell,* 29 F.2d 915, 916 (5th Cir. 1929):

> "[I]t is fundamental that federal courts, in common with other courts, have inherent power to do all things that are reasonably necessary for the administration of justice, within the scope of their jurisdiction."

This Honorable Court has held that 28 U.S.C.A. §1651 empowers federal courts to issue writs in aid of their jurisdiction, *Adams v. United States,* 317 U.S. 269, 272-73 (1942), and that a federal court has the inherent "equitable powers of courts of law over their own process, to prevent abuses, oppression and injustices." *Gumbel v. Pitkin,* 124 U.S. 131, 144 (1888).

In *United States v. Western Pennsylvania Sand & Gravel Association,* 114 F. Supp. 158 (W.D. Pa. 1953), the District Court for Western District of Pennsylvania cited §1651(a) and said:

> "The basic and underlying principle of law has long prevailed that a court by necessity has the power

and authority to issue all writs and orders to preserve and maintain jurisdiction of the principal cause of action as well as the parties thereto. This doctrine has been deeply imbedded into a federal jurisprudence, and through the years has nurtured and fed lifeblood into the federal judicial organism." *Id.* at 159.

In light of the foregoing, the Northern District Court's Order of September 3 was a valid exercise of its inherent powers. The judgment of the Learned Appellate Court vacating that Order severely limits the ability of the federal courts to control matters pending before them. Therefore, Petitioner believes that this matter is a proper one for review by this Honorable Court.

2. Respondents, by improperly appealing the Northern District Court's Order of September 3, were able to divest the Court of its jurisdiction to complete a hearing of the case, which was ancillary to the proceedings in the Southern District Court.

On or about September 4, Respondents appealed the Northern District Court's Order of September 3 as if that Order were a preliminary injunction. Petitioner submits that the Order was not a preliminary injunction and was not appealable under Rule 8 of the Federal Rules of Appellate Procedure.

The Northern District Court believed that the case was related to the Southern District cases and was ancillary to them. Thus, when the Court scheduled a further hearing for September 8, it contemplated not only the hearing of further evidence but also the possible availability by September 8 of the Southern District Court's adjudication and opinion.

With full knowledge that a further hearing was scheduled for September 8, and in disregard of that fact, Respondents immediately filed Notice of Appeal of the Order of September 3, thereby depriving the Northern District Court of jurisdiction to hear the case fully. Petitioner submits that for the Learned Court of Appeals to vacate the Order because of the lack of a full hearing, where the appeal itself prevented the full hearing, is contrary to public policy and inconsistent with the principles of the federal judicial system.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 15,173

Consolidation Coal Company, a corporation, Appellee,
v.
Disabled Miners of Southern West Virginia, etc., et al., Appellants.

Appeal from Orders of the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, Chief Judge.

NO. 15,396

Consolidation Coal Company, a corporation, Appellant,
v.
Disabled Miners of Southern West Virginia, etc., et al., Appellees.

NO. 15,397

United States Steel Corporation, a corporation, Appellant,
v.
Disabled Miners of Southern West Virginia, etc., et al., Appellees.

NO. 15,398

Youngstown Mines Corporation, a corporation, Appellant,
v.
Disabled Miners of Southern West Virginia, etc., et al., Appellees.

Appendix A.

NO. 15,399

Eastern Associated Coal Corporation, and Sterling Smokeless Coal Company, corporations, Appellants,

v.

Disabled Miners of Southern West Virginia, etc., et al., Appellees.

NO. 15,400

Olga Coal Company, a corporation, Appellant,

v.

Disabled Miners of Southern West Virginia, etc., et al., Appellees.

NO. 15,401

Ranger Fuel Corporation, a corporation, Appellant,

v.

Disabled Miners of Southern West Virginia, etc., et al., Appellees.

NO. 15,402

Elmer Brown, Roma Cook, Bernard "Red" Cox, Levi Daniel, Jimmy Ellis, Leon Foley, John Mendez, George Mounts, Robert Payne, Clifford Ratliff, and James Turnstalle, Appellants,

v.

Consolidation Coal Company, a corporation, United States Steel Corporation, a corporation, Youngstown Mines Corp., a corporation, Eastern Associated Coal Corp., a corporation, Olga Coal Company, a corporation, and Ranger Fuel Corporation, a corporation, Appellees.

Appeals from the United States District Court for the Southern District of West Virginia, at Bluefield. Sidney L. Christie, District Judge.

Appendix A.

(Argued April 7, 1971 Decided May 12, 1971.)

Before WINTER, CRAVEN and BUTZNER, Circuit Judges.

Herbert J. Rogers and Kenneth J. Yablonski (Donald L. Pitts and Clarice Fieldman, on brief) for Appellants in No. 15,173; Harold R. Schmidt (Karl Alexander and Rose, Schmidt and Dixon, on brief) for Appellee in No. 15,173; Charles A. Tutwiler, Russell L. Furbee, Harold R. Schmidt, and Charles M. Love (Crockett, Tutwiler and Crockett; Furbee, Amos, Webb and Critchfield; Karl Alexander and Rose, Schmidt, and Dixon; Campbell, Love, Woodroe and Kizer; and Thomas B. Miller, Schmidt, Laas, Schrader and Miller, on brief) for Appellants in Nos. 15,396 through 15,401 and for Appellees in No. 15,402; Ray E. Ratliffe, Jr. for Appellees in Nos. 15,396 through 15,401; and Richard M. Bank (Naomi W. Cohen, Harvey M. Cohen and Joseph F. Flynn, on brief) for Appellants in No. 15,402.

WINTER, Circuit Judge:

These consolidated appeals arise from litigation instituted when disabled miners and their dependents picketed, and threatened to picket, plaintiffs' bituminous coal mines in the Northern and Southern Districts of West Virginia. Preliminary injunctions to enjoin picketing were entered in both district courts. The disabled miners and their dependents had resorted to this form of self-help to redress their alleged grievances against the trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "Fund"). The Fund was established by collective bargaining, under the authority of § 302 of the Labor-Management Relations Act of 1947, 29 U.S.C.A. § 186,

to receive royalties from the mine owners on coal mined and to establish and administer a program of benefits for the miners and their dependents. In essence, the disabled miners and their dependents claim that they have been denied benefits to which they are, or ought to be, entitled.

In No. 15,173 (from the Northern District of West Virginia) and in No. 15,402 (from the Southern District of West Virginia), the disabled miners and their dependents appeal from the entry of preliminary injunctions enjoining picketing. In Nos. 15,396-15,401 (from the Southern District of West Virginia), the plaintiffs, mine owners, appeal from the dismissal, as a party defendant, of the Association of Disabled Miners and Widows, Inc. (the "Association") in their several suits to enjoin actual and threatened picketing. The dismissal was granted on the ground that the Association had not been properly served.

We affirm the preliminary injunction entered in the Southern District of West Virginia appeals, although we will require it to be modified. We reverse the dismissal of the Association as a party defendant in the Southern District of West Virginia cases. We vacate the preliminary injunction in the Northern District of West Virginia cases on the grounds of procedural irregularities. We remand all cases to the respective district courts in which they originated for further proceedings and final determination.

— I —

The facts from which the legal issues are derived may be briefly stated. The Fund is administered by three trustees — one who is a representative of the coal

companies (employers), one who is a representative of the union (United Mine Workers of America), and the third a neutral party selected by the other two. The Fund receives from the mine owners a royalty of forty cents per ton for each ton of coal mined. In accordance with the contract and the Act, the royalties received are used to make payments, from principal or income, or both, of (1) benefits to employees, their families and dependents, for medical care, pensions or retirement or death, and compensation for injuries or illness (or insurance to provide such compensation); (2) benefits for wage losses not compensated for by state or federal law, (3) benefits for sickness, temporary or permanent disability, death or retirement, and (4) other benefits as may be agreed upon, from time to time, by the trustees. The establishment of precise benefits and their administration are matters committed to the authority of the trustees. In the administration of exising benefits and in the establishment of new benefits, the disabled miners and their dependents claim that they have received unfair and unequal treatment.

The mine operators are engaged in mining bituminous coal for sale and shipment in interstate commerce to customers who use the coal principally to generate electricity and to produce steel. Over thirty million tons of coal are mined a year and thousands of coal miners are employed.

The disabled miners and their dependents have no direct grievance with the coal operators or with the union. What they seek is a more liberal administration of the benefits currently established under the Fund and/or the establishment of new benefits. To accomplish

this purpose, the disabled miners and their dependents have relied on what is asserted to be a well-established tradition among members of the United Mine Workers of America that a coal miner will not cross a picket line, irrespective of the objective of the picketing. Thus, from June 21 to June 24, 1970, the disabled miners and their dependents picketed coal mines in the Southern District of West Virginia and succeeded in shutting down the mines for that period. The theory of the disabled miners and their dependents was that if they exerted economic pressure on the mine operators and the union, the operators and the union would exert pressure on the trustees of the Fund, designated by them, to establish the benefits sought. For a period after June 24 picketing was discontinued, in part because the annual vacation period in the industry ensued, but then it was resumed in July, when the mine owners each instituted suit and obtained a temporary restraining order. Later the cases were consolidated and a preliminary injunction granted.

On or about August 10, it became known that the disabled miners and their dependents planned to carry their work interference to miners located in the Northern District of West Virginia. Picketing actually resulted at two mines in that district, and there was a threat that picketing would be extended to other mines. In the Northern District, two of the mine owners instituted suit and obtained a temporary restraining order against picketing. The temporary restraining order was obtained on August 14 and expired on August 24; and, on the latter date, that order was extended until September 3. A hearing on an application for a preliminary injunction began on the afternoon of September 3, and, when it became obvious that it could not be completed

prior to the expiration hour of the order, the district judge, on his own motion, extended the order for an additional ten days, issued a preliminary injunction and set the matter for further hearing for September 8. Before September 8, however, the district judge suffered an accidental injury and the hearing on September 8 could not be held. Thereafter, the disabled miners appealed and no further proceedings on the merits have been conducted. The preliminary injunction has continued.

— II —

Very recently we decided *The West Virginia Highlands Conservancy v. Island Creek Coal Company*, —— F.2d —— (4 Cir., April 6, 1971), which restated the principles governing the grant of preliminary injunctions by district courts and the scope of review on appeal. These principles control here.

With regard to scope of review, we stated "[t]he decision to grant a preliminary injunction is discretionary with the district judge and may not be set aside on appeal unless an abuse of discretion is shown." With regard to when a district judge may grant a preliminary injunction, we will repeat what we said in the *Conservancy* case. There, the Conservancy sought and obtained a preliminary injunction to restrain a forest supervisor (Dorrell) from granting a permit to engage in logging in a wilderness area. We said (—— F.2d at ——):

> it is not necessary that Conservancy demonstrate an absolute right to the relief it seeks in order to sustain the issuance of this preliminary injunction; *it need establish only "probable right."* It is apparent that Conservancy has raised substantial

issues concerning the application of recent federal conservationist legislation to the administration of the National Forest system. Such issues are of great current public concern. They should be fully developed and litigated at the trial level in order to insure their proper resolution. It is at that stage that the various defenses raised by Dorrell should be asserted. While we express no opinion on these questions on their merits, we can say that their resolution is not immediately apparent. That is enough to say that Conservancy has not embarked on frivolous litigation, and thus *interlocutory relief is not improper if Conservancy can also show a need for protection which outweighs any probable injury to Dorrell.* (emphasis supplied.)

We also held that the public interest in the effect of the dispute must be taken into acount in any determination of whether to grant injunctive relief. —— F.2d at ——.

— III —

In the cases at bar, plaintiffs have shown a reasonable likelihood that they will prevail on the merits of the litigation.

The former employees and their dependents argue strenuously and exhaustively that the preliminary injunction violated the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101, *et seq.*, because the parties are engaged in a labor dispute and the type of self-help employed may not be enjoined under 29 U.S.C.A. § 104. They contend that even if their concerted action does have the effect of substantial disruption of interstate commerce in bituminous coal, those

actions are exempted from the antitrust laws by the labor exemption in the Clayton Act, 15 U.S.C.A. § 17; 29 U.S.C.A. § 52. They claim that their right to engage in peaceful picketing is protected by the First Amendment and, therefore, the effect of the preliminary injunctions is to deny them their First Amendment rights. Finally, they argue that their activities do not constitute a tortious interference with the contractual relation between the coal operators and their employees under applicable state law.

To the contrary, plaintiffs assert as vigorously that the Norris-LaGuardia Act is inapplicable because there is not a "labor dispute" between the parties under the special circumstances where only the trustees of the Fund, whom plaintiffs assert are independent fiduciaries, can grant the relief the disabled miners seek and where the disabled miners and their dependents are not employees of the coal operators. These same special circumstances, it is also argued, render inapplicable the labor exemptions of the Clayton Act. With regard to the First Amendment, plaintiffs argue that the right to picket is not absolute, that the picketing was neither peaceful nor informational and that the purpose of the picketing was unlawful, i.e., to "turn off the lights" in the country by cutting off the supply of coal to electrical generating plants. Finally, plaintiffs contend that they showed *prima facie* a combination or conspiracy in violation of the Sherman Act, 15 U.S.C.A. § 1, and, under state law, a tortious interference with the contractual relationship between plaintiffs and their employees.

The district judge of the Southern District of West Virginia did not finally decide these legal questions;

nor do we. He concluded only that there was at least a "reasonable likelihood . . . that the plaintiffs will succeed at the final hearing on the merits of the cases." We agree. But, because we do not finally decide these issues and because a full record has not been made, we will not discuss in detail the authorities and legal theories which support this conclusion. It suffices to say that whether there is a labor dispute between the parties — a question upon which application of the Norris-LaGuardia Act and the labor exception in the Clayton Act largely depend — would seem to turn upon the factual determination of whether the employer-employee trustees of the Fund are independent fiduciaries or whether they are representatives of the groups which designate them and whether they are amenable to pressures from the designating group. Neither the Act nor the agreement under which the Fund was established indicate that the trustees of the Fund are, or ought to be, merely conduits for articulation of the views of the persons who designated them as trustees, and there was some evidence in the Southern District cases that they are not. If the Fund is in fact insulated from the normal forces of industrial disputes, as the Act permitting such funds apparently contemplates, then disputes concerning them may be enjoinable despite the Norris-LaGuardia Act. This view is supported by the rationale of *Boys Market v. Retail Clerk's Union,* —— U.S. —— (1970), in which the Supreme Court held that a federal district court could properly enjoin a union from striking where the strike violated a no-strike clause and an agreement to submit disputes to arbitration. See generally, Note, *The Supreme Court 1969 Term,* 84 Harv. L. Rev. 30,200

(1970). However, we reserve decision on the precise scope of the exception established by *Boys Market* pending further development of the facts in this case.

Similarly, there have been cases recognizing exceptions to the labor exemptions from the antitrust laws where job action is taken in pursuit of goals not normally considered labor goals. See, *e.g., United Mineworkers v. Pennington,* 381 U.S. 657 (1965); *Duplex Co. v. Deering,* 254 U.S. 443 (1921). Although this line of cases has been severely restricted, see *e.g., Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965); *United States v. Hutcheson,* 312 U.S. 219 (1941), it may be that plaintiffs can establish that the present case is not exempt. If they cannot, an injunction still may be supportable under state tort law. As to the issue of free speech, we note that the imminent danger of infringement of a highly significant state interest — the continued operation of large parts of the West Virginia coal industry — has been alleged. It may be sufficient to overcome what is other wise protected by the First Amendment.

We do not decide these issues now. Final resolution of them will require more extensive factual inquiry. Indeed, the district courts should give consideration to joining the Fund and the trustees as proper parties to the litigation to facilitate that inquiry if jurisdiction can be obtained over them. We conclude only that plaintiffs have demonstrated at least probable right to injunctive relief on the present record.

— IV —

Similarly, we conclude plaintiffs have shown a need for protection which, when considered together

with the interests of the public, outweighs any probable injury to the defendants. We recognize that the disabled miners and their dependents may suffer greatly if their cause is just and they are being deprived of benefits to which they are entitled, but we agree with the district judge in the Southern District cases that "[t]he plaintiffs and general public will suffer greater injury by denial of a preliminary injunction than will the defendants and other members of the designated class and others acting in concert with them by the granting of a preliminary injunction." —— F.S. at ——. State relief and social security payments may mitigate some hardship, but we agree that against the interests of the disabled miners, must be balanced the interests of a far larger number of persons and institutions in the continued functioning of large parts of the coal mining industry in West Virginia. Believing that this latter interest is the greater, we conclude that there was no abuse of discretion in the granting of the preliminary injunction in the Southern District cases and that, in the main, the decree should be affirmed.

— V —

Whenever the extraordinary writ of injunction is granted, it should be tailored to restrain no more than what is reasonably required to accomplish its ends. Particularly is this so when preliminary relief, on something less than a full record and full resolution of the facts, is granted.

In the Southern District cases, the record clearly supports the finding that picketing, with the effect of closing the mines, took place. There was also some evi-

dence that sporadic acts of violence were perpetrated although the district judge made no finding as to this. The injunctive order restrained "[p]icketing *or in any other manner* interfering with the orderly resumption of, or continuation of, operations at any mine in whole or in part owned and/or operated by any of the respective plaintiffs . . ." (emphasis added.) But the order went further. It restrained the disabled miners and their dependents and others acting in concert from "[c]oercing *or otherwise inducing*" plaintiffs' employees to withhold their services from any of the plaintiffs or at any of the plaintiffs' mines. (emphasis added.)

In the "any other manner" and the "inducing" phrases, we think the order too broad. If the district judge was persuaded by the proffered evidence of use of force and violence, it would have been proper for him to enjoin "interference by force or violence" or "inducing by force or violence, etc." But without this qualification, the "any other manner" category and the verb "inducing" would include pure expressions of opinion and thus infringe upon the exercise of First Amendment rights which did not seek to capitalize upon the asserted principle that no coal miner will cross any picket line irrespective of the object of picketing. The disabled miners and their dependents should not be restrained from publicizing their alleged grievances, short of picketing or employing force or violence to achieve their goals.

We will vacate these portions of the injunction and remand the case for further consideration, including the entry of a properly restricted order, in accordance with these views.

Appendix A.

— VI —

When plaintiffs instituted their suits in the Southern District of West Virginia they named, *inter alia,* the Association as a party defendant. In addition to being a named defendant, the Association can be said to have been sued also as a member of a class of persons acting in concert with other named individual defendants for the achievement of the same objectives. Service of a temporary restraining order issued July 9, 1970, was purportedly made upon the Association, but personal service strictly in accordance with the federal rules and the West Virginia statutes was not immediately obtained. On July 16, 1970, the Association moved to be dismissed from the proceedings because of lack of service of process and to quash the purported service of the temporary restraining order. Before the district judge ruled on this motion plaintiffs effected service of process on the Association in accordance with Rule 4(d)(7), *F.R.Civ.P.,* and West Virginia Code, Chapter 31, Article 1, § 71 (Michie Supp. 1971), which the rule makes applicable. Nonetheless, in ruling upon the motion, the district judge considered that he was bound to decide whether service had been made as of July 16, 1970. He concluded that service was defective insofar as the Association had been sued individually, and, on July 23, 1970, he dismissed it from the cases as a named defendant. He reserved the question of whether it should be retained as a defendant as a member of the class; and, after taking some evidence, he dismissed it in that capacity also by an order entered August 11, 1970. His later ruling was apparently predicated upon his acceptance of testimony that the Association had sought to discourage its individual members who were

named defendants from engaging in the picketing and other activities which the plaintiffs contended were illegal. Although the Association was dismissed from the proceedings in both capacities in which it had been sued, the dismissal order of August 11 stated that it was without prejudice to the plaintiffs' right to rejoin the Association, "either individually and/or as a member of any class should further pretrial discovery and/or the development of evidence otherwise justify such joinder . . ."

We think the dismissals were in error. Whatever deficiencies there may have been in service of process prior to July 21, 1970, it sems clear that service upon the Association as a named defendant was properly accomplished on that date. Rule 4(d)(7) permits service "in the manner prescribed by the law of the state in which the district court is held," and service on the West Virginia State Auditor's office was made in accordance with the provisions of the West Virginia Code. It may well be that the proof of the Association's participation in the picketing which was enjoined was insufficient to convince the district judge that the Association should be included within the scope of the injunction, but that objection can be readily met by excluding the Association from the operation of the preliminary injunction. There was some evidence of participation by an officer and some members of the Association in organizing the picketing, and there was proof of disclaimer by the Association that it sponsored the strike. Manifestly, there is a potential factual dispute which will require resolution, but, from the standpoint of the sufficiency of technical service and the desirability of retaining the Associa-

tion as a party for purpose of pretrial discovery to facilitate ultimate resolution of the dispute, we conclude that the Association, while it need not be enjoined, should not have been dismissed. We will reverse the orders of dismissal without intimating any opinion on whether the Association is a party against which preliminary or permanent relief should be granted.

— VII —

In our view, the preliminary injunction entered in the Northern District of West Virginia must be vacated for noncompliance with Rule 65, *F.R.Civ.P.* To set forth the basis of our decision, it is necessary to elaborate on what actually transpired.

The temporary restraining order of August 14 was obtained *ex parte* on the basis of a verified complaint, supplemented by affidavits. By its terms, it expired at 5:00 P. M. on August 24. The complaint contained a prayer for a preliminary injunction, and a hearing thereon was set for August 24 at 4:00 P. M.

At the hearing on August 24, there were present counsel for the parties and a number of witnesses. The hearing did not result in the taking of any testimony, however. Rather, there was a discussion between counsel and the court to the effect that the litigation in the Northern District of West Virginia was ancillary to that previously filed and pending in the Southern District of West Virginia. Indeed, the findings and conclusions of the Southern District were specifically considered. Mindful that the August 14 temporary restraining order would expire at 5:00 P. M. on August 24, the district judge, without hearing a single witness or receiving any additional evidence, simply concluded to extend the

temporary restraining order until 5:00 P. M. on September 3. He entered an order to that effect and set the matter for hearing on September 3 at 1:30 P.M.

On September 3 at 1:00 P. M., the next hearing began. In attendance were counsel for the parties and a number of witnesses. The testimony of a single witness, the vice president of operations for one of the plaintiffs, was taken. He was permitted to testify, over objection, that when he was in the vicinity of a mine in the *Southern* District of West Virginia, he had a conversation with men who were acting in connection with the disabled miners and they stated that they were there to shut down the mine. The witness was permitted to identify a document purporting to show the tonnage of coal lost by picketing in the *Southern* District of West Virginia, and he testified to the total production of coal of his employer's mines moving in interstate commerce. On cross-examination he admitted that he had no familiarity with any work stoppage in the Northern District of West Virginia, except what he read in the newspapers.

After receipt of this testimony and some colloquy with counsel, the district judge noted that the temporary restraining order as extended would expire in one hour and ten minutes. The court called attention to the discussion in 7 Moore's *Federal Practice*, ¶ 65.07, p. 1648, where Professor Moore suggests that if it is impractical or impossible to conclude a hearing and render a decision on an application for preliminary injunction before a temporary restraining order expires, the court should have authority to extend the temporary restraining order beyond twenty days, notwithstanding the con-

trary rule laid down in *Sims v. Greene,* 161 F.2d 87 (3 Cir. 1947). Accordingly, the district judge extended the temporary restraining order until September 13. At the same time, he granted a preliminary injunction similar in scope to that in the Southern District, but set down the matter for a further hearing on September 8, a hearing which was not held because of the district judge's intervening accident.

It is the orders of September 3 that are appealed from here. The temporary restraining order has expired, so the only issue before us is the validity of the preliminary injunction. The disabled miners and their dependents filed their notice of appeal on September 8, and the district judge retired the cases from the active docket, so that the preliminary injunction has continued to the present date.

The district judge made no specific findings to support his grant of preliminary injunction, but he did state that he thought the evidence was sufficient to indicate that plaintiffs' employees rendered services regularly as miners at plaintiffs' mines, but that the defendants were able to interrupt the work. The interruption occurred, so he said, prior to August 14 — the date on which the first suit was filed in the Northern District of West Virginia — and the district judge added that since then, there had not been, to his knowledge, any wrongful conduct.

Repeatedly throughout the various stages of the proceedings, defendants moved, both orally and by formal motion, to dissolve the temporary restraining order. There is no suggestion in the record that they ever consented to the temporary restraining order, the extension thereof, or to a preliminary injunction.

As we view the record, we can only conclude that for practical purposes plaintiffs obtained an *ex parte* preliminary injunction in a case in which there were sharply disputed questions of fact and of law. This was manifestly error, because Rule 65(a)(1) is explicit that "[n]o preliminary injunction shall be issued without notice to the adverse party;" and, as stated in *Sims v. Greene,* 161 F.2d 87, 88-89 (3 Cir. 1947):

> Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy. It should be pointed out also that subsection (b) of Rule 65 provides that a motion for a preliminary injunction "shall be set down for a *hearing* * * *" and speaks of the motion coming on for "hearing." * * * The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one sided presentation of the evidence. (footnotes eliminated.)

Accord, *Detroit & T.S.L.R. Co. v. Brotherhood of Locomotive Firemen,* 357 F.2d 152 (6 Cir. 1966); *Hawkins v. Board of Control of Florida,* 253 F.2d 753 (5 Cir. 1958) (per curiam); 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1433 (Wright ed. 1958). But see, *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541 (9 Cir. 1969).

Specifically, the district judge should have given the parties sufficient time to present their proofs. He should have made findings of fact and stated conclusions of law to support the issuance of a preliminary

injunction if he concluded that the injunction should issue. Rule 52(a), *F.R.Civ.P.* We are unpersuaded by plaintiffs' argument, initialy suggested by the district judge, that somehow the stringent requirements of Rule 65 can be circumvented on the theory that the litigation in the Northern District was "ancillary" to that pending in the Southern District. The fact is that while there was some identity of plaintiffs in the lawsuits in the two districts, there was not an identity of defendants nor was there any identity of mines at which allegedly unlawful picketing had occurred. It was, therefore, decidedly improper to issue a preliminary injunction without strict compliance with Rule 65. Diligence in following the requirements of the Rule is particularly important in preliminary injunction cases because the persons enjoined must obey the order, and can be punished for violating it, despite irregularities in the procedure by which it was obtained. *United States v. United Mine Workers,* 330 U.S. 258 (1947).

We, therefore, vacate the preliminary injunction entered in the Northern District of West Virginia. We do so, however, without prejudice to a renewal of the motions therefor and the proper grant of relief in a proceeding where the requirements of Rule 65 are met.

No. 15,173
VACATED and REMANDED.

Nos. 15,396-15,401
REVERSED and REMANDED,

No. 15,402
MODIFIED and AFFIRMED.

APPENDIX B

[See Jt. App. p. 257a et seq.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

CONSOLIDATION COAL COMPANY, a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1216

UNITED STATES STEEL CORPORATION, a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1218

YOUNGSTOWN MINES CORP., a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1220

EASTERN ASSOCIATED COAL CORP. and STERLING SMOKELESS COAL COMPANY, corporations, Plaintiffs
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1221

Appendix B.

OLGA COAL COMPANY, a corporation, Plaintiff V. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants	CIVIL ACTION No. 1222

RANGER FUEL CORPORATION, a corporation, Plaintiff V. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants	CIVIL ACTION No. 1223

CHRISTIE, DISTRICT JUDGE:

Procedural Background

On July 9, 1970, Consolidation Coal Company instituted Action No. 1216 in this court to enjoin and restrain defendants from effectuating a restraint of interstate commerce in the production, sale and transportation of bituminous coal throughout the United States—and to recover damages for the injury resulting to it therefrom—alleging that a conspiracy was being effectuated particularly in the Southern District of West Virginia with respect to certain of its mines there. The action also proceeded upon the basis that the acts complained of constituted tortious interference with employment contracts and the expected economic benefits from continued performance of work by plaintiff's employees. On July 11, 1970, United States Steel Corporation instituted a similar action in this court, Action No. 1218, and on July 13, 1970, Youngstown Mines Corp., Eastern Associated Coal Corp. — Sterling Smokeless

Coal Co., Olga Coal Company, and Ranger Fuel Corporation all instituted similar actions in this court that are, respectively, Actions Nos. 1220, 1221, 1222 and 1223.

When each action was instituted, the plaintiff moved for and there was issued, based on the verified complaint and supporting affidavits, a temporary restraining order which restrained the defendants and others from doing certain acts therein set forth in detail. Bond in the amount of $5,000 was posted in each case, duly approved and filed.

In each case, the plaintiff moved for leave to take expedited depositions. In the Consolidation Coal case, No. 1216, the depositions of six of the named defendants were taken on July 14, 1970, and a transcript thereof is on file in that case.

A hearing on Consolidation's motion for a preliminary injunction began on July 16, 1970, and at that time, by stipulation and order, the United States Steel case, No. 1218, was consolidated with Consolidation's case No. 1216 for purposes of the hearing. The hearing continued throughout the day of July 16, 1970, and was prepared to resume on July 17, 1970, when it appeared to the Court that there was a possibility of a practical resolution of the problem, and as a result, by stipulation and order and consent of all parties, the temporary restraining order was extended indefinitely and until further order of the Court.

However, by Monday, July 20, 1970, it was evident to the Court and all parties that the hoped-for practical resolution of the matter was not to be forthcoming and, accordingly, resumption of the hearing was sched-

uled for, and began, July 22, 1970. At that time, the hearings in the other four cases, Youngstown Mines Corp., No. 1220; Eastern Associated Coal Corp. — Sterling Smokeless Coal Company, No. 1221; Olga Coal Company, No. 1222 and Ranger Fuel Corporation, No. 1223, were consolidated with the hearing in progress with the effect that all evidence and proceedings in each case would be part of the evdence and proceedings in all the cases and the temporary restraining order in each case, by consent of counsel, was extended indefinitely and until the adjudication by the Court as to whether or not a preliminary injunction should be issued in all the consolidated cases.

On that basis, the hearing continued on July 22, 23, 27, 28, 29, 30, 31, August 10 and 11, 1970. The Association of Disabled Miners and Widows, Inc., a nonprofit corporation, was dismissed from the cases and, by amendment, the Disabled Miners of Southern West Virginia, an unincorporated association, was substituted, and related changes were made in the Complaints.

Statement of the Case

Each of the plaintiffs is a corporation engaged, *inter alia,* in mining bituminous coal in the Southern District of West Virginia, and each plaintiff has mines in the district from which it produces coal and ships it in substantial quantities in interstate commerce.

Beginning on or about June 21, 1970, interferences with the production and shipment of bituminous coal in interstate commerce began to occur and, with some interruptions, the same continued until quite recently and the threat of their resumption has not entirely dissipated.

Appendix B.

It is alleged that the work stoppage or interference is the result of a combination or conspiracy to restrain trade in interstate commerce by disabled miners and widows who are dissatisfied with the operation of the United Mine Workers of America Welfare and Retirement Fund of 1950, an independent trust set up and operated under and in accordance with the applicable provisions of the Labor Management Relations Act, 1947. As a matter of completeness, although the operators and the union each, respectively, have the right, under the applicable provisions of the collective bargaining agreement, to appoint one of the three trustees and those two then select a neutral third trustee, it is nowhere asserted that the coal operators have any right whatsoever to intermeddle in the operation or supervision of the Fund, since all of the trustees are fiduciaries whose duties are governed by the law and the factual circumstances relating to the Fund. Accordingly, no decision with respect to these matter is involved here.

It is further alleged that there is, in these cases, no labor dispute involving any of the plaintiffs and their employees, and that the purpose and scheme of the combination and conspiracy was to prevent and coerce plaintiffs' employees, by the use of pickets at the mines, from entering therein and mining coal for shipment in interstate commerce, in the hope and with the expectation that such interferences would in some manner operate to bring such pressure to bear upon the trustees of the welfare fund as to force them to liberalize its administration to accommodate the demands of the disabled miners and widows of deceased miners, the resultant effect of which has in fact closed many of plain-

tiffs' mines, has interfered with the interstate shipment of coal and has wrought substantial and irreparable loss, injury and damages to the plaintiffs, and if not restrained and enjoined, will cause them imminent future irreparable loss, injury and damage.

Issues

1. Whether the Court has jurisdiction to grant injunctive relief.

2. Whether the plaintiffs are engaged in interstate commerce.

3. Whether the defendants and/or other members of the designated class and/or others acting in concert with them have combined and conspired to restrain interstate commerce in bituminous coal in violation of the applicable provisions of the Sherman Antitrust law and have done so.

4. Whether the activities of the defendants and/or other members of the designated class and/or others acting in concert with them are protected or validated by any constitutional guarantees including, but not limited to, the First Amendment to the Constitution of the United States.

5. Whether defendants and/or other members of the designated class and/or others acting in concert with them have committed tortious interferences with employment contracts of the plaintiffs and the expected economic benefits from continued performance of work by plaintiffs' employees.

6. Whether, unless enjoined and restrained, the defendants and/or members of the designated class

and/or others acting in concert with them will continue to commit illegal and improper acts.

7. Whether the plaintiffs have suffered and will suffer immediate and irreparable loss, injury and damage by reason of the actions of the defendants and/or other members of the designated class and/or others acting in concert with them.

8. Whether the plaintiffs have an adequate remedy at law.

9. Whether there is a reasonable likelihood that the plaintiffs will prevail upon the ultimate disposition of this case.

10. Whether a preliminary injunction, effective until further order of this Court or pending the ultimate disposition of the case on the merits, should be issued in all the consolidated cases.

Findings of Fact

1. The Court has jurisdiction over this action under the provisions of 28 U.S.C.A. 1337; 15 U.S.C.A. 1 (Sherman Act) and 15 U.S.C.A. 15, 22 and 26 (Clayton Act). The Court also has diversity jurisdiction in No. 1216 and No. 1218 under the provisions of 28 U.S.C.A. 1332 and pendent jurisdiction in all the cases with respect to the tortious interference cause of action.

2. Each of the plaintiffs has been and is now engaged in the production, sale and shipment of bituminous coal in interstate commerce.

3. There is no labor dispute involved in this case within the purview of the Norris-LaGuardia Act (29 U.S.C.A. 113(c)) for the reasons, among others, (a)

that the defendants and other members of the designated class and others acting in concert with them are not, either together or otherwise, a labor organization, (b) that the matters involved here embody alleged grievances of a number of people — including widows — (actual or allegedly potential beneficiaries of an independent trust known as the United Mine Workers of America Welfare and Retirement Fund of 1950) against the trustees thereof, and (c) that the objective sought by the defendants and other members of the designated class and others acting in concert with them can only be effected by the trustees of the Fund and not by the plaintiffs. Thus, the Norris-LaGuardia Act, 29 U.S.C.A. Sections 101, 104 and 113, has no application to the instant case and this Court is not thereby divested of jurisdiction to entertain the plaintiffs' suit for injunctive relief.

4. The Court's jurisdiction has not been preempted by the National Labor Relations Board under the Labor Management Relations Act, 1947 or the National Labor Relations Act, 29 U.S.C.A. 141, et seq., because the defendants and other members of the designated class and others acting in concert with them do not, either together or otherwise, constitute a "labor organization" within the purview of 29 U.S.C.A. Section 152(5), and further because none of the defendants or any members of the designated class or any others acting in concert with them has made any demands of any kind upon the plaintiffs respecting grievances, labor disputes, wages, rates of pay, hours of employment, conditions of work or otherwise.

5. Employees of the respective plaintiffs, at their various mines, have worked and rendered services steadily, pursuant to employment contracts, without interruption, until the performance of the acts of the defendants and other members of the designated class and others acting in concert with them, namely, disabled miners and widows and others acting for or on their behalf and/or for the achievement of the same objectives.

6. None of the plaintiffs has any labor dispute of any kind with its employees and/or their collective bargaining representatives and if the defendants and other members of the designated class and others acting in concert with them had not performed the improper acts hereinafter set forth in these findings of fact, the respective plaintiffs would have received the benefit of the continued services of their employees and would have continued to maintain the flow of bituminous coal in interstate commerce.

7. The defendants and other members of the designated class and others acting in concert with them have entered into a combination or conspiracy intentionally to restrain the production and flow of bituminous coal in interstate commerce throughout a substantial portion of the United States for the illegal purpose of substantially restricting the supply of bituminous coal to the electricity generating and steel producing industries in the United States. This was and is being done in order to bring pressure upon the trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 so as to influence said trustees in the performance of their fiduciary duties

and to make them liberalize the benefits made payable by said Fund to disabled miners and widows.

8. The defendants and other members of the designated class and others acting in concert with them have performed overt acts in effectuation of the aforementioned combination and conspiracy in that they have picketed, coerced, induced and otherwise interfered with employees of the respective plaintiffs in the performance of their duties and functions as coal miners in the operation of the mines of the plaintiffs, and have thereby disrupted and restrained the production and flow of bituminous coal in interstate commerce in a substantial part of the bituminous coal producing area of the United States.

9. The aforementioned combination and conspiracy and the overt acts carried out pursuant thereto constitute an unlawful restraint of interstate commerce in bituminous coal in violation of Section 1 of the Sherman Act.

10. The interruption in production and shipment of bituminous coal and the resulting interruption of the supply of coal in interstate commerce caused by the illegal activities of the defendants and other members of the designated class and others acting in concert with them have caused the plaintiffs and the public generally great and irreparable loss, injury and damage, and, if continued, would continue to cause the same to the plaintiffs and the public.

11. The aforementioned acts of the defendants and other members of the designated class and others acting in concert with them also constitute tortious interference with the employment contracts of the

plaintiffs and the plaintiffs' expected economic benefit from the continued performance of work of their employees who were induced and/or coerced by the defendants and other members of the designated class and others acting in concert with them into a cessation and/or interruption of work.

12. The defendants and other members of the designated class and others acting in concert with them have committed and are committing illegal acts and will continue to do so unless enjoined and restrained.

13. The cessation and/or interruption of work of plaintiffs' employees was not voluntary but was instigated and caused by the acts of the defendants and other members of the designated class and others acting in concert with them.

14. There were and are ample legitimate and lawful means and methods available to the defendants and/or other members of the designated class and/or others acting in concert with them to petition for redress of their alleged grievances against the trustees of their United Mine Workers of America Welfare and Retirement Fund of 1950 without tortiously interfering with and causing plaintiffs' employees involuntarily to breach their obligation to the plaintiffs under the National Bituminous Coal Wage Agreement of 1968 and interfering with the plaintiffs' expected economic benefit from the continued performance of work of their employees, and such unlawful activities of the defendants and/or other members of the designated class and/or others acting in concert with them were and are not in any way protected or validated by any constitutional guarantee, including, but not limited to, the

First Amendment to the Constitution of the United States, for it is an established principle of constitutional law that picketing in furtherance of an unlawful purpose may not be protected under the guise of freedom of speech or assembly.

15. The plaintiffs have no adequate remedy at law for the reason that much of the loss, injury and damage suffered by the plaintiffs as a result of the aforementioned acts of the defendants and other members of the designated class and others acting in concert with them, including, but not limited to, loss of customers, employees and good will, cannot be calculated and compensated for in money damages. The plaintiffs have no adequate remedy at law for the further reason that they will be required to commence a new legal action each time the defendants and other members of the designated class and others acting in concert with them commit the aforementioned acts in the future, thereby causing a multiplicity of litigation.

16. By their activities and the resultant effects thereof upon the coal industry and industries dependent upon the industry for their fuel, metallurgical and chemical needs, the defendants appear to have brought their grievances to the attention of the coal industry, the trustees of the welfare and pension fund, the mine workers union and the public generally. In fact, twenty-three congressmen have already jointly introduced a bill in Congress designed to meet their needs. It is only logical to assume also that, within the limitation permitted by Section 302(c) (5) of the Labor Management Relations Act, 1947, 29 U.S.C.A. 186, and the terms of the agreement setting up the trust fund in question, the matter will be made the subject of proper discussion and

appropriate action by the industry and the union at their contract negotiations coming up next year. Thus, the Court cannot forsee at this time where or how the cause of the grievants can be advanced by a prolongation of any activity having for its objective the closing of mines and the concomitant loss of revenue to the welfare and pension fund. On the other hand, it is clear from the evidence adduced, and the Court so finds, that the plaintiffs and general public will suffer irreparable injury and damage if such activities are permitted to be resumed. The conclusion, therefore, is inescapable that the plaintiffs and general public will suffer greater injury by denial of a preliminary injunction than will the defendants by the granting of a preliminary injunction.

Conclusions of Law

1. This Court has jurisdiction over the subject matter and the parties in these actions.

2. Jurisdiction of these actions is conferred by the provisions of 28 U.S.C.A. 1337; 15 U.S.C.A. 1 (Sherman Act) and 15 U.S.C.A. 15, 22 and 26 (Clayton Act). There is also diversity jurisdiction in No. 1216 and No. 1218 under the provision of 28 U.S.C.A. 1332 and pendent jurisdiction in all the cases with respect to the tortious interference cause of action.

3. This Court is not deprived of jurisdiction to grant injunctive or similiar relief by any provision of the Norris-LaGuardia Act (29 U.S.C.A. Section 101, et seq.) nor by any of the provisions or exemptions of the antitrust laws contained in 15 U.S.C.A. Section 17.

4. This Court's jurisdiction has not been preempted by the National Labor Relations Board under

the Labor Management Relations Act, 1947 or the National Labor Relations Act, 29 U.S.C.A. 141, et seq., because the defendants and other members of the designated class and others acting in concert with them do not, either together or otherwise, constitute a "labor organization" within the purview of 29 U.S.C.A. Section 152(5), and their actions and conduct here in question are neither arguably protected nor prohibited thereby.

5. The defendants and other members of the designated class and others acting in concert with them have committed and are committing illegal acts and will continue to do so unless enjoined and restrained.

6. Employees of the respective plaintiffs, at their various mines, have worked and rendered services steadily, pursuant to employment contracts, without interruption, until the performance of the acts of the defendants and other members of the designated class and others acting in concert with them, namely, disabled miners and widows, for the achievement of the same objectives.

7. The plaintiffs have no labor disputes of any kind with their employees and/or their employees' collective bargaining representatives and if the defendants and other members of the designated class and others acting in concert with them had not performed the improper acts hereinabove set forth in the findings of fact, the respective plaintiffs would have received the benefit of the continued services of their employees and would have continued to maintain the flow of bituminous coal in interstate commerce.

8. The defendants and other members of the designate class and others acting in concert with them have entered into a combination or conspiracy intentionally to restrain the production and flow of bituminous coal in interstate commerce throughout a substantial portion of the United States for the illegal purpose of substantially restricting the supply of bituminous coal to the electricity generating and steel producing industries in the United States, and have committed overt acts pursuant to said combination or conspiracy by bringing pressure upon the trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 so as to influence said trustees in the performance of their fiduciary duties and to make them liberalize the benefits made payable by said Fund to disabled miners and widows, in violation of 15 U.S.C.A. 1, commonly known as the Sherman Act.

9. The aforementioned acts of the defendants and other members of the designated class and others acting in concert with them also constitute tortious interferences with the employment contracts of the plaintiffs and the plaintiffs' expected economic benefit from the continued performance of work of their employees who were induced and/or coerced by the defendants and other members of the designated class and others acting in concert with them into a cessation and/or interruption of work.

10. The activities of the defendants and/or other members of the designated class and/or others acting in concert with them are not in any way protected or validated by any constitutional guarantee including, but not limited to, the First Amendment to the Constitution of the United States.

11. The plaintiffs and the general public have suffered and will continue to suffer irreparable loss, injury and damage in the future unless the defendants and other members of the designated class and others acting in concert with them are preliminarily enjoined from continuing to commit the illegal acts which they have committed.

12. From the evidence as presented, it is clearly established not only that there is reasonable likelihood, but a very strong probability, that the plaintiffs will succeed at the final hearing on the merits of the cases.

13. The plaintiffs and general public will suffer greater injury by denial of a preliminary injunction than will the defendants and other members of the designated class and others acting in concert with them by the granting of a preliminary injunction.

14. The plaintiffs have no adequate remedy at law for the reason that much of the loss, injury and damage suffered by the plaintiffs as a result of the aforementioned acts of the defendents and other members of the designated class and others acting in concert with them, including, but not limited to, loss of customers, employees and good will, cannot be calculated and compensated for in money damages. The plaintiffs have no adequate remedy at law for the further reason that they will be required to commence new legal action each time the defendants and other members of the designated class and others acting in concert with them commit the aforementioned acts in the future, thereby causing a multiplicity of litigation.

15. The several motions of the defendants to deny or dismiss plaintiffs' motions for preliminary injunction

will all be overruled and a preliminary injunction will issue in all the consolidated cases upon the posting of proper bond, which preliminary injunction will remain effective until the determination of these cases upon the merits or until the further order of the Court.

Counsel will prepare an appropriate order overruling defendants' motion to deny or dismiss plaintiffs motions for preliminary injunction, granting the preliminary injunction as prayed for, and providing for a continuance of bond in like amount as given under the temporary restraining order.

Service of the injunction order may be had upon the defendants by service of a copy thereof on the various counsel of record.

This Opinion incorporates the Findings of Fact and Conclusions of Law in accordance with the provisions contained in Federal Rule of Civil Procedure 52.

/s/ SIDNEY L. CHRISTIE
United States District Judge

APENDIX C

[See Jt. App. p. 274a et seq.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

CONSOLIDATION COAL COMPANY, a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1216

UNITED STATES STEEL CORPORATION, a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1218

YOUNGSTOWN MINES CORP., a corporation, Plaintiff
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1220

EASTERN ASSOCIATED COAL CORP. and STERLING SMOKELESS COAL COMPANY, corporations, Plaintiffs
V.
DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants

CIVIL ACTION No. 1221

Appendix C.

OLGA COAL COMPANY, a corporation, Plaintiff V. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants	CIVIL ACTION No. 1222
RANGER FUEL CORPORATION, a corporation, Plaintiff V. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, an unincorporated association, et al., Defendants	CIVIL ACTION No. 1223

ORDER

AND NOW, to wit, this 16th day of September, 1970, after each of the plaintiffs filed a verified complaint and affidavits in support thereof and after due and proper notice and extensive hearings and the taking of voluminous testimony and reception of other evidence into the record, all of which was duly considered by the Court, and on the basis of the adjudication, findings of fact and conclusions of law heretofore made, all of which are fully incorporated in this Order as reasons for its issuance as if physically set out herein (in addition to the reasons set forth in this Order itself), to comply with Rules 52 and 65 of the Federal Rules of Civil Procedure and it appearing to the Court and the Court finding and concluding that it has been clearly established that the defendants and other members of the designated class, and others acting in concert with them, have committed and are committing illegal acts, and will continue to do so unless enjoined and restrained; that the plaintiffs and the general public

have suffered and will continue to suffer irreparable loss, injury and damage in the future unless the defendants and other members of the designated class, and others acting in concert with them, are preliminarily enjoined and restrained from committing the aforesaid illegal acts; that the palintiffs have no adequate remedy at law for the reason that much of the loss, injury and damage suffered by the plaintiffs as a result of the aforementioned acts of the defendants and other members of the designated class and others acting in concert with them, including, but not limited to, loss of customers, employees and good will, cannot be calculated and compensated for in money damages and the plaintiffs have no adequate remedy at law for the further reason that they will be required to commence a new legal action each time the defendants and other members of the designated class and others acting in concert with them commit the aforementioned acts in the future, thereby causing a multiplicity of litigation; and that from the evidence it has been clearly established not only that there is reasonable likelihood, but a very strong probability, that the plaintiffs will succeed at the final hearing on the merits of the cases and that the plaintiffs and the general public will suffer greater injury by the denial of a preliminary injunction than will the defendants and other members of the designated class and others acting in concert with them by the granting of a preliminary injunction;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, DIRECTED and DECREED that all defendants' motions to deny and/or dismissed plaintiffs' motions for preliminary injunction be and they are hereby overruled and refused; and

Appendix C.

It is hereby ORDERED, ADJUDGED, DIRECTED and DECREED that the defendants Disabled Miners of Southern West Virginia, an unicorporated Association, also known as The Southern West Virginia Disabled Miners Association, also known as The Southern West Virginia Disabled Miners and Widows Association, and Dennis Allen, Charles Altizer, Douglas Bowling, Elmer Brown, Donald Combs, Roma Cook, Frazier Cortle, Bernard "Red" Cox, Jack Crockett, Levi Daniel, Jimmy Ellis, Leon Foley, Bobby Gillespie, Tilden Graham, S. D. Hall, Quinton Johnson, Homer Kiser, Chris Linkous, Robert Matthews, John Mendez, Tobb Miller, William Miller, Arlin Mills, Douglas Mills, George Mounts, Robert Payne, Clifford Ratliff, Johnny Mike Ratliff, Ralph Sparks, Jr., Posey Stewart, Albert Treadway, James Turnstalle and Walter Wilcox, individually, and as members of a class representing the aforementioned unincorporated association, and others acting in concert with it and/or them and/or for the achievement of the same objectives (i.e. liberalized benefits for disabled miners and widows from the UMWA Welfare and Retirement Fund), with the aforementioned unincorporated association representing its members, their officers, agents, servants, employees, and attorneys and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, be and they hereby are immediately enjoined and restrained, pending a final determination herein or until further order of court, from doing each and every of the following:

1. Picketing or in any other manner interfering with the orderly resumption of, or continuation of, operations at any mine in whole or in part

owned and/or operated by any of the respective plaintiffs; and

2. Coercing or otherwise inducing any of the employees of the respective plaintiffs and/or any of the employees employed at any mine in whole or in part owned and/or operated by any of the respective plaintiffs, to withhold their services from any of said plaintiffs and/or at any of said mines.

This Order shall not become effective until a bond in the amount of $5,000.00 shall have been filed in compliance with Rule 65 of the Federal Rules of Civil Procedure by each of the respective plaintiffs and approved by this Court or the Clerk thereof.

Service of this injunction Order may be had upon the defendants by personal service of a true copy thereof on them.

/s/ SIDNEY L. CHRISTIE
United States District Judge

Enter; This 16th day of September, 1970.

APPENDIX D

[See Jt. App. p. 1025a et seq.]

Excerpts From Transcript of Proceedings on Hearing for Preliminary Injunction, Held on September 3, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CONSOLIDATION COAL COMPANY Vs. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, ET AL.,	Civil Action No. 70-121-E
VALLEY CAMP COAL COMPANY, Vs. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, ET AL.,	Civil Action No. 70-122-E

BEFORE: The Honorable ROBERT E. MAXWELL, Judge.

Sept. 3, 1970
Wheeling,
W. Va.

PRESENT:

For the Plaintiffs:
HAROLD R. SCHMIDT, Esq.
GARRY MCQUONE, Esq.
H. YALE GUTNICK, Esq.
THOMAS B. MILLER, Esq.

For the Defendants:
HERBERT J. ROGERS, Esq.
KENNETH YABLONSKI, Esq.

Appendix D.

Whereupon, at 1:00 o'clock P.M. on the 3rd day of September, 1970, in the United States District Courtroom in Wheeling, West Virginia, the following proceedings were had in the above styled matters, to-wit:

[2] PROCEEDINGS

The Court: We have scheduled for this time, two matters and the first of which is Civil Action Number 70-121-E, Consolidation Coal Company versus Disabled Miners of Southern West Virginia and others, and secondly, Civil Action Number 70-122-E and this is entitled Valley Camp Coal company versus Disabled Miners of Southern West Virginia and others.

* * * * * * *

[4] [*The Court*:] Now, I think the burden, of course, is on the plaintiffs to carry forward with the preliminary hearing.

I might ask counsel for the plaintiffs the number of witnesses they anticipate presenting on this issue and the estimated extent of time that would be needed in this regard?

Mr. Schmidt: If the Court please, I would say at this time, without wanting to be bound by it, either by the number of the maximum or minimum, we anticipate [5] approximately ten witnesses and depending upon the length of cross examination on that testimony, we believe we have streamlined the testimony in to taking an hour to an hour and a half.

* * * * * * *

[11] *The Court*: I have the motion to dissolve the temporary restraining order, pending appeal.

Is that what you are speaking of?

Mr. Rogers: Yes, Yes, your Honor.

The Court: All right.

I think on the basis of the law that I have been able to find, particularly in Moore's treatise on the subject and that 3rd ALR annotation that I have [12] earlier referred to, that I would be required to overrule the motion to dissolve the temporary restraining order, which by its own terms expires in approximately three hours from this time.

I realize that our time is very short, but I expect with the time that we have available, that it would be best for us to go ahead and proceed with the factual inquiry.

The Court will just have to later look to the issues of law and the briefs and to research of it and so forth, that what is necessary to investigate these rather serious questions of law.

* * * * * * *

[38] *Mr. Yablonski*: If it please the Court.

The Court: Mr. Yablonski.

Mr. Yablonski: If I may address myself to one matter that Mr. Schmidt keeps referring to and that "is the emergency situation" which apparently now faces him by his own inaction.

When this temporary restraining order was continued ten days ago, there was nothing to prevent Mr. Schmidt or other counsel from asking for a hearing prior to today, but they chose not to do so.

The Court: Yes, there was. I will have to take the responsibility here.

When we had the points of law raised that you raised, I asked counsel how long you would need to file briefs in the matter and ten days was the advice that I was given.

This, to my mind, was the first order of priority. So, the motions for preliminary injunction have been pending and we have been trying to get priorities and I don't want the record to be confused by being out of context.

* * * * * * *

[53] [*The Court*:] The hour is now 3:25. If there is anything further to be presented, I will be glad to hear it until [54] 3:45. That is a period of twenty minutes and then I believe it is incumbent upon the court to make observations that are pertinent and material to the case.

So, with that observation in mind gentlemen, I will be glad to hear any expressions that counsel may have.

* * * * * * *

[74] *The Court*: We have reached a cross-road in these two cases now before the court. We are presently in a hearing relative to leading to the Court making a consideration of a preliminary injunction under Rule 65(B).

The temporary restraining order as extended expires in one hour and ten minutes. So therefore, the Court must continue the evidentiary portion of this litigation in order that the Court can address itself to the matters that are present and apparent and are needed in this intermediate stage to be looked at.

* * * * * * *

[75] We are confronted here today with — or I would say that it has been suggested that we are confronted today with an alternative. We must either have a preliminary injunction issue or the temporary restraining order must fail in its entirety and the Court in a sense, loses total control of the issues that are presented.

* * * * * * *

We have before the Court the verified complaint in each of the two cases. We have exhibits that are [76] attached and affidavits that help us discuss and reach the preliminary issues only.

Now, it would be entirely inappropriate and unjudicious and improper in every particular to say at this juncture, at this stage, to say that either side, either party is totally right or is totally wrong, or can do something or cannot do something.

This case has not developed to that point. Indeed, it is a complex case and has many sides and faces. And to this, this Court has a responsibility to the parties, to the public and to the industry, and has a responsibility of seeing that these issues are properly, fully and adequately developed.

* * * * * * *

[78] Now, so much for that. Of course, the Court has carefully read the verified complaint and has read the attached affidavits and the exhibits that were earlier received by the Court at the two earlier hearings.

We have a congress situation here in a way. We have a mater of law before the Court instituted on August 14. There was no appearance by anyone, and this is not any problem and no complaint, until the return day

of the initially granted temporary restraining order and that was on August 24. At that time, counsel of record were noted and a series of imposing motions raising really serious and impressive legal questions were filed.

* * * * * * * *

[79] So it is a serious situation and not light at all, and must not be done away with the wave of a hand or a flourish of a pen or a well turned phrase. We must be very conscientious about it.

So the Court on the 24th of August extended the temporary restraining order for an additional ten day period of time. There seems to be no question that the Court has this right. It is a discretionary power [80] for good cause shown.

I stated on the record at that time the good cause which I felt perhaps controlled or prevailed in this particular, and the matter was then extended until today.

Now we must look to the issue of whether or not the factual issues presented permit the Court to extend the temporary restraining order or as a matter of law, does it have to be handled in the way of preliminary injunction based on facts.

I am going to turn our attention perhaps to the best statement of this that I could find; this is a highly unusual case. So there has been very little law on the matter. But I would direct counsel's attention to 7 Moores Federal Practice, Section 65.07 at page 1648. I am going to read three paragraphs for they are not long.

> "Within the expiration time, the restraining order may be extended for good cause shown."

This was the initial extension.

"Good cause depends upon the relevant circumstances of the case. When this is shown the court may extend the restraining order for a like period."

This has to do with the first extension.

[81] "An extension may also be made when the party against whom the order is directed consents. Sims versus Green stated that no temporary restraining order may be continued beyond twenty days, unless the party against whom the order is directed consents that it may be extended for a longer period."

This is the Third Circuit Case decided in 1947, 160 Federal 2d, 512.

Professor Moore's commentary followed with — "With deference we believe that this statement too narrowly interprets 65(B) and to rigidly circumscribes the district court's power for although we agree with the general principle of the case that indiscriminate extensions, without consent, cannot be tolerated, there may be circumstances which warrant an additional extention for good cause which would make the overall period exceed twenty days."

Footnote 11 on page 1649 says —

"For example, suppose that the restraining order originally ran for 10 days; that within that time the order was, for good cause, extended an additional 10 days; and that within this extended time it was impracticable to bring the application [82] for the preliminary injunction on for hearing, or

that it came on for hearing, but it was not possible to conclude that hearing and render decision within the extended time. A court's power should not be so rigidly circumscribed that an additional extension could not be made for good cause, although the restrained party refused consent."

A comparable case relied upon is Section 2284, applicable to three judge court cases which provides in part.

"The order, unless previously revoked by the district judge shall remain in force only until the hearing and determination by the full court."

* * * * * * *

[84] Now getting back to the commentaries of Professor Moore, we have, of course, reference to similar decisions that prevailed in the construction of Rule 65(B).

Now the Court in this case, in the record here presented, would be touched by this question. Are the imposing legal issues that have been presented and been briefed now, on motion of defendant, are these tantamount to a consent to continue the matter?

The Court here believes that there is justification, there are circumstances and conditions, when to preserve the status quo is justified and it does not violate the spirit or intent of Rule 65 (B) to extend the matter beyond the twenty days.

In other words, as we look at it from its vantage point of litigation. If delay under these circumstances is to be considered an evil, it is a delay in the judicial process and certainly is not a prejudicial type of delay, because we must not shoot from the hip as we approach

these serious questions that have been raised by defense motions and matters of law.

We must decisively, carefully and cautiously study them. We must review them carefully and come to reason and conclusion and preserve the status quo in the litigation among the parties, this is of paramount importance. [85] We live in a country under a rule of law. We live in a place where we have a forum to bring our questions and to bring our problems and to discuss them fully and adequately and carefully, and to have a place to be heard, to have a place to receive consideration. And this it seems, is the solemn responsibility of this court to maintain the status quo. So that in an orderly, judiciously conducted atmosphere we can get right down to the very heart of the problems that we have under the rules of law and make the decisions and make the determinations that are right and proper.

So, for this point of law and the facts that we have here and because we have to interrupt the factual development of the case, the Court believes that an extension of time is proper.

* * * * * * *

[86] We have as a matter of findings of fact or conclusions of law, I will supplement what I have earlier said in this discussion here in open court, by making a finding that the Court does at this juncture have jurisdiction here over the parties and over the subject matter in litigation, the employees.

The evidence before the Court, I think, is sufficient at this preliminary stage to indicate that the employees of the respective plaintiffs at the various [87] mines alleged in the verified complaint, work and render serv-

ices in a steady manner, and they did this in keeping with their employment contract without interruption and that there were acts of parties, including the party defendants, and other members of the same group or same thought, that for the purpose of achieving objectives for disabled miners and widows, were able to interrupt the work process of the plaintiffs. And this all occurred before August 14, the date of the first action in this Court.

Since that time, to the Court's knowledge, there has been on wrongful conduct. No suggested misdoings, nothing of this nature. And this is highly commendable to all of the parties, that we have been able to approach this cooly and in good spirits and good order.

Now, it does seem that from everything presented here that the actions that are before the Court of having so called "closing of the mines" was in order to require the United Mine Workers Retirement and Welfare Fund to perform more expansively in their fiduciary role by liberalizing benefits paid out of the fund to disabled miners and to widows and to others under the provisions of the fund and who are entiled to receive consideration.

Now, if the complained of acts are true, if [88] when we study this out cautiously and carefully, we find that the things alleged under oath should not have occured and that they were improper, illegal or wrong, then I am sure none of us would disagree with the conclusion that not only the plaintiffs but the public in general loses.

The activities that occurred prior to August 14, of course, caused irreparable loss and injury to the plaintiffs, for they have no way to make up lost days or lost

production, but as we look to the future it seems particularly important that we study this out carefully to determine who, if anyone, is wronged and what if any remedies are available.

Now there is no doubt this is a summary proceeding. This is not a final proceeding. This is not a judgment with judicial finality that a full trial and hearing would bring. But this will permit us to maintain in the status quo as to all parties. And this will allow us to proceed very orderly and with concern to everyone. And we will not have a situation as we had today where in a matter of a few hours we have to cram an entire issue in.

We can't do it that way. Under any rules of law, we've got to be sensible, reasonable, quiet and well organized and orderly. [89] And these are the reasons that the Court must perceive.

Now, if there is anything wrong here, if these plaintiffs have suffered because of something being wrong by these defendants, there is no adequate remedy in law.

And if everything that has been said in these proceedings during these three times that this Court has set, if the matters that are well pleaded are true, there will be an opportunity for the parties to recover. And it appears that there might be a substantial opportunity for plaintiff to have the benefit of their labor contract, their employment and the work of their employees proceed uninterruptedly.

So, for these reasons, the Court believes that until we get into all of the law on the matter, until we can

accumulate the evidence, until we can proceed on with the litigation in an orderly way, such as our country was founded upon in 1776, the only reason we have this country is that we have a good orderly process of law.

The Court believes that in addition to the matters that I have already stated, a preliminary injunction should issue in each of these cases.

Now also, time is of the essence here, and I think perhaps if counsel will stand by, I will dictate [90] the order. And I will reference the Court's findings and conclusions that I have just made as a part of the record. I will reference it into the order. We will enter a preliminary injunction. I will set a bond for each of the plaintiffs in the sum of five thousand dollars.

* * * * * * *

[92] One other thing that I will add on to what has already been discussed, and that is that this matter will be generally continued until Tuesday, September 8, at 11:00 a.m. in the Federal courtroom in Elkins for the continuation of testimony and on the motion by the plaintiffs for a preliminary injunction —

* * * * * * *

[97] *Mr. Schmidt*: * * * And in view of the fact that this is a very important matter, Consolidation Coal Company through me, has been accused of delay and not doing things on time and I want to urge upon the Court most vigorously to continue with the hearing at the earliest possible moment and I do not engage in frivolity when I say that we are prepared to start at anytime, including immediately to continue on without interruption regardless of Saturdays, Sundays, holidays

or anything else or for any other court commitment that our office or Mr. Miller's office might have.

We want no delay, we want no postponements. We want the immediate opportunity to present the facts and want to terminate once and for all any accusations [98] that either Consolidation Coal Company or the Valley Camp Coal Company is in anyway failing in their obligations to process this matter fully, completely and with due regard to the requirements for the administration of justice.

* * * * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CONSOLIDATION COAL COMPANY, a corporation, Plaintiff v. DISABLED MINERS OF SOUTHERN WEST VIRGINIA, et al., Defendant	Civil Action No. 70-121-E

ORDER

This day came the parties hereto by their attorneys and for reasons stated by the Court in open Court, upon the record of the Court, the same are now being designated and considered as the Court's findings of fact and conclusion of law and made a part hereof as fully and completely as if physically attached hereto, it is Adjudged and Ordered:

1. Because of the imposing legal issues presented by defendants earlier filed motions to which briefs were this day submitted to the Court which issues of law take precedence over the regulations of Rule 65(b) as to resolution of factual issues in injunction proceedings by way of preliminary injunction, the temporary restraining Order initially granted on August 14, 1970, and extended for a period of ten (10) days on August 24, 1970, is further extended for a period of ten (10) days from 5:00 o'clock, p.m., September 3, 1970, until 5:00 o'clock, p.m., September 13, 1970. It is the opinion of the Court that this extension of time is made in order that the

Court can resolve the legal issues raised in motions earlier filed by defendants.

2. For reasons stated by the Court, the same being considered as findings of fact and conclusions of law, a preliminary injunction is granted plaintiffs in order that a correct, fair and just disposition of the issues in this case and the proper protection of the rights of all parties can be had.

In connection with said prelminary injunction, it is

ORDERED that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them or acting on their behalf and to whom notice or knowledge of this Order shall come are hereby restrained from:

1. Picketing or in any other manner interfering with the orderly resumption of or continuation of operations at any of the plaintiff's mines; and

2. Coercing or otherwise inducing any of plaintiff's employees from withholding their services from plaintiff.

The preliminary injunction is granted on condition that a bond be filed by plaintiff herein in the sum of Five Thousand Dollars ($5,000.00), for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, said bond to be approved by this Court of the Clerk thereof.

The further hearing of this matter is continued until Tuesday, September 8, 1970, at 11:00 o'clock A.M., at the Federal Court Room in Elkins, West Virginia, at

which time further testimony may be taken on plaintiff's motion for a preliminary injunction.

A copy of this order may be served by the United States Marshal upon each defendant forthwith.

This order issued at 5:24 P.M., DST, this 3rd day of September, 1970.

/s/ ROBERT E. MAXWELL
United States District Judge

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No.

IN THE

Supreme Court of the United States

October Term, 1971

CONSOLIDATION COAL COMPANY, UNITED STATES STEEL CORPORATION, YOUNGSTOWN MINES CORP., EASTERN ASSOCIATED COAL CORP., STERLING SMOKELESS COAL COMPANY, OLGA COAL COMPANY, and RANGER FUEL CORPORATION,

Petitioners,

v.

DISABLED MINERS OF SOUTHERN WEST VIRGINIA, and unincorporated association, ELMER BROWN, FRED COGAR, ROMA COOK, BERNARD "RED" COX, LEVI DANIEL, JIMMY ELLIS, LEON FOLEY, JOHN GUZEK, JAMES KIDD, JOHN MENDEZ, GEORGE MOUNTS, ROBERT PAYNE, CLIFFORD RATLIFF, HERBERT J. ROGERS, JAMES S. ROGERS, STANLEY RYNKEIVICH, ROBERT SHORES, JAMES TURNSTALLE, DAVID WHITLACK, JACK WILLIAMS and DONALD YOHO,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON BEHALF OF RESPONDENTS IN CIVIL APPEAL NO. 15,402

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Respondents.

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COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Respondents believe some portions of the statement of the case by the Petitioners to be inaccurate and incomplete, and therefore misleading. To the extent

necessary to counteract these deficiencies, the Respondents offer a counterstatement of the case.[1]

THE FACTS

The Petitioners operate coal mines in southern West Virginia (Jt. App. p. 260 A.).

The Respondents are, for the most part, disabled coal miners who, as a result of yearly toil in the mines, have suffered such impairment to their health that they cannot work and care for their families' needs. (D/59, 97, 154, 156, 323; T/591-593; D/56, 57, 98, 137, 314, 323, 154-156, 274, 259).

Throughout their working lives these men have been members of the United Mine Workers of America (D/57, 281; T/1136-37, 1145-49). When they worked, they counted upon the security of pension and health benefits from the United Mine Workers of America Welfare and Retirement Fund to provide for the basic needs of themselves and their families in case they became disabled.

The Fund is financed entirely by a royalty of forty cents per ton of coal mined by miners employed by

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1. The majority of the references in this counterstatement will be directly to the record. On the appeal to the Fourth Circuit Court of Appeals there was a joint appendix. However, most of the material therein was evidence considered important by the Petitioners. The respondents herein, mostly disabled miners, had and have extremely limited finances. Therefore, they could afford to have only basic pleadings and papers reprinted.

Thus, for the purpose of this brief, where reference is not to the Petitioners' or Respondents' appendices in the present proceedings, the following abbreviations will be used to designate the part of the record referred to:

a/ The joint appendix filed in the appeal to the Fourth Circuit.

D/ Depositions of Respondents, Payne, Brown, Cook, Cox, Steward and Ellis, taken on July 14, 1970, and subsequently made a part of the record.

T/ The four volumes of testimony transcribed by the District Court Reporter between July 15 and July 31, 1970, and filed as part of the record.

each signatory coal operator. (Plaintiffs' Exhibit 19, see pages 80-82 of said Exhibit). Petitioners were signatories to the agreement creating the Fund at the time of the incidents which gave rise to this case.

The Fund is operated and adminstered by a three-member Board of Trustees, which makes the rules and sets the policies by which pensions are granted or denied. One of the three Trustees is the legal representative of the Petitioners and other signatory coal mine operators (Plaintiffs' Exhibit 19, see page 5, 80-81 of said Exhibit).

When the Respondents became disabled, each was denied health and/or pension benefits under the Fund's current rules and regulations. (D/57, 58, 219; T/687; D/56, 281; T/1136-37, 1145-49).

To remedy their plight, and that of other disabled miners and widows, Respondent Payne and six other disabled miners designated themselves The Disabled Miners of Southern West Virginia (hereinafter Disabled Miners) and began to hold public rallies in and around southern West Virginia. At these rallies general discussions concerning the grievances of disabled miners occurred and various solutions were posed. (D/14, 15, 28, 31, 33, 60, 78, 79, 63, 68, 137, 138, 219, 220, 237, 344, 345). During the period in which these rallies and speeches were held, not a single mine was shut down because of the refusal of miners to work in support of the disabled miners and their dependents.

However, starting on June 20 and extending through June 24, 1970, many disabled miners, their dependents and some active miners picketed coal mines in southern

West Virginia. The picketing prompted a strike of active miners which brought production to a halt. (441a; 458a; 459a; 493a; 509a; 536a-37a; 558a; 578a; 606a; 633a; 653a; 669a; 735a; 741a; 743a; 776a). The purpose of the strike was to motivate the union and the companies to influence their representatives on the Board of Trustees of the Welfare and Retirement Fund to exercise their discretion to liberalize its policies regarding distribution of benefits. (D/78, 219, 220, 237, 343, 344).

As soon as the pickets withdrew, the active miners returned to work and production resumed. (693a-695a).

With the withdrawal of the pickets, the Disabled Miners made attempts to initiate negotiations with the Board of Trustees. All were rebuffed. (T/1112-13; 1110-1118, 1136-1137; D/351-53, 342-43).

As a result, on July 12, 1970, the Disabled Miners and others began to resume picketing. Mines which were picketed shut down because active miners refused to work. In a matter of days pickets closed down mines all over West Virginia, and in some sections of Kentucky and Virginia. No mines closed down without the presence of pickets. (D/34, 37, 38, 41, 137, 138, 307, 310; T/1165-1167).

As set forth in the Petitioners' statement of the case, "when a resumption of picketing became imminent," Petitioners commenced actions seeking injunctive relief; in the days and weeks following, temporary restraining orders were issued and hearings held.

On September 8, 1970, the Southern District Court issued its Opinion, Findings, and Conclusions. (Peti-

tioners' App. B p. 21 a.). Its findings were general, and lacked detail; the Court mentioned only one overt act utilized to close down the mines: namely, picketing. (Petitioners' App. B p. 30 a.).

The injunction issued by the Court, however, restrained Respondents and others from "[p]icketing or *in any other manner interferring with*" operations at Petitioners' mines and from "[c]oercing *or otherwise inducing*" employees of Petitioners to withhold their services. (Petitioners' App. C p. 38a). (emphasis added).

On September 24, 1970, Respondents filed Notice of Appeal. On appeal, the United States Court of Appeals for the Fourth Circuit modified the injunction. It continued injunctive protection against picketing and violence by the Respondents. However, it deleted the language italicized above on the grounds that this language was overbroad and infringed upon the exercise of First Amendment freedoms. The Court held:

> "In the Southern District cases, the record clearly supports the finding that picketing with the effect of closing the mines took place. There was also some evidence that sporadic acts of violence were perpetrated although the district judge made no finding as to this . . .
>
> In the 'and other manner' and the 'inducing' phrases, we think the order too broad. If the district judge was persuaded by the proffered evidence of the use of force and violence, it would have been proper for him to enjoin 'interference by force or violence' or 'inducing by force or violence, etc.' But without this qualification, the 'any other manner' category and the verb 'in-

ducing' would include pure expressions of opinion and thus infringe upon the exercise of First Amendment rights which did not seek to capitalize upon the asserted principle that no coal miner will cross any picket line irrespective of the object of picketing. The disabled miners and their dependents should not be restrained from publicizing their alleged grievances, short of picketing or employing force and violence to achieve their goals." (Petitioners' App. A. p. 12a, 13a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The decision of the Court of Appeals is harmonious with prior applicable decisions of this Court which have held that an injunction, particularly one which is issued on less than a full record and which endangers First Amendment freedoms, must be narrowly tailored to restrain no more than the actual unlawful conduct revealed in the record and described in the findings of fact.

A. *The findings of fact in this case fail to disclose any specific conduct, other than picketing, which was instrumental in or effective to accomplish a shutdown of the mines.*

The holding of the Court of Appeals in the instant case makes these facts clear:

1. The Court did not find, nor did it ratify, any finding by the District Court, that publicizing activities other than picketing were employed by the Respondents with the intention of bringing about the illegal object which the injunction was granted to protect against.

2. The Court did not find, nor did it ratify, any finding by the District Court that

publicizing activities, other than picketing, actually played a significant part in shutting down the mines.

Indeed, the Court could not have found otherwise. The Petitioners made no other contention. In both the District Court and the Court of Appeals they argued strenuously that a simple knee-jerk response to the presence of pickets, accompanied by violence, kept miners away from work. (Respondents' App. Pg. A-1, 2). Now, Petitioners advance a totally contradictory theory of the facts. They claim that the publicizing activities of Respondents played a part in causing the shutdown, and they ask this Court to approve of muzzling the Respondents in addition to shackling them.

This new theory is set out at page 6 of Petitioners' brief. Out of the more than two thousand pages of testimony they asked to have transcribed, and out of the hundreds they included in their Appendix, Petitioners cite to the testimony of only one witness to confirm this new found interpretation of the facts. When analyzed, that testimony reveals only that if there were no pickets, sometimes the miners at the witness' mine would not work. The witness then speculated that the men were afraid of violence if they worked. This is hardly a verification of plaintiffs' present contention that pure speech was utilized to effect a work stoppage or was operative in achieving it.

In sum, the Court of Appeals in the instant case, tailored an injunction to fit the facts it found, corresponding exactly to the theory of the facts advanced below by the Petitioners. In doing so, it followed unquestionably sound principles long established by this Court.

B. *The decision of the Court of Appeals to modify the injunction granted by the District Court is consistent with rulings of this Court which require that any restraint which may infringe upon protected areas of expression must be worded with the utmost precision and delicacy.*

This Court has repeatedly held that statutes, and particularly injunctions, tainted with the vice of overbreadth are constitutionally infirm. Thus, the Court of Appeals correctly applied precedent in limiting an overbroad and loosely worded injunction when rights of expression protected by the First Amendment were endangered. *United States* v. *Robel*, 389 U. S. 258, 262-3, 268 (1967); *Smith* v. *California*, 361 U. S. 147, 150-1 (1959); *Winters* v. *New York*, 333 U. S. 507, 509-10 (1948).

This principle was recently reasserted in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175, 183-4 (1968):

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved, *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case."

The principle set out in *Carroll* and the other cases cited for the same proposition are part and parcel of

this Court's consistently applied doctrine requiring that courts review in a restrictive light decisions involving prior restraint of expression. As stated in *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963):

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."

Accord: *Carroll* v. *President and Commissioners of Princess Anne*, supra; *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418-420 (1971).

The holding of the Court of Appeals is also harmonious with holdings of this Court that courts have a duty to protect individuals from the chilling effect upon exercise of First Amendment freedoms generated by injunctions whose vague wording causes them to sweep within their scope overbroad classes of activities and individuals. *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967); *Carroll*, supra, and *Robel*, supra, enunciate this classic protective principle that courts have an overriding duty to prevent the discouraging effect on free discussion wrought by injunctions which are so vaguely worded that parties cannot know what is proscribed and who is included within their proscriptions.

Had the Court of Appeals allowed the injunction of the District Court to stand as drafted, its decision would have been in flat derogation of this principle. The District Court's injunction extended to "picketing or in any other manner interfering" with the operation

of Petitioners' mines, and "coercing or otherwise inducing" miners not to work in Petitioners' mines. This admonition extended not only to named defendants and the Disabled Miners Association, but to "others acting in concert with it and/or them and/or for the achievement of the same objectives (i.e. liberalized benefits for disabled miners and widows from the UMWA Welfare and Retirement Fund) . . ." (Petitioners' App. C page 41a).

Certainly the combined effect of overbreadth of the description of the activities enjoined and the vagueness of definition of those against whom the injunction ran would have chilled, if not frozen, public discussion by large segments of West Virginia population of the issue of miners' and dependents' benefits.

C. *No case cited by the Petitioners is inconsistent with the decision of the Court of Appeals in this case.*

The petitioners cite *Schenck* v. *United States*, 249 U. S. 47 (1919); *Adderly* v. *Florida*, 385 U. S. 39 (1966); and *Konigsberg* v. *State Bar of California*, 366 U. S. 36 (1961) for the propositions that:

1. Speech is subject to reasonable regulation, to protect the rights of others, and

2. This Court does not hold an absolutist view of the First Amendment.

Neither of these propositions conflicts with the opinion of the Court of Appeals. Moreover, not one of these cases involves prior restraint of pure speech. Thus *Schenck*, *Adderly* and *Konigsberg* provide absolutely no guidance as to whether, under the particular cir-

cumstances of the case at issue, injunction of activities other than picketing is justified.

Neither does Petitioners' leading case, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1948). Petitioners cite *Giboney* for the broad proposition that where "publicizing" constitutes an essential part of a single and integrated course of conduct in violation of law, it may be enjoined. They then contend that *Giboney's* holding controls the instant case. This contention is incorrect for the following reasons:

First, the only "publicizing" which *Giboney* held enjoinable was picketing; not the use of opinion or belief remote from the scene of picketing. The opinion of the Missouri Supreme Court in the *Giboney* case made this clear. That court held:

> "The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree . . ."

Empire Storage & Ice Co. v. *Giboney*, 210 S. W. 2d 55, 58 (Mo. 1948).

This Court definitively interpreted *Giboney's* scope in *Intl. Brotherhood of Teamsters, Local 695* v. *Vogt*, 354 U. S. 284 (1957), Mr. Justice Frankfurter summarized the decision in *Giboney* as follows:

> "A union, seeking to organize peddlers, picketed a wholesale dealer to induce it to refrain from selling to nonunion peddlers. The state courts, finding that such an agreement would constitute a conspiracy in restraint of trade in violation of the state antitrust laws, enjoined the picketing. This Court affirmed unanimously." *Id.*, at 291 (emphasis added).

In the same opinion, Mr. Justice Douglas, dissenting, expanded on Justice Frankfurter's description of the significance of *Giboney*:

> "Of course, we have always recognized that *picketing has aspects which make it more than speech. Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 776-777 (concurring opinion). That difference underlies our decision in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. There, *picketing* was an essential part of "a single and integrated course of conduct, which was in violation of Missouri's valid law." *Id.*, at 498. (emphasis added).
>
> * * *
>
> "I would return to the test enunciated in *Giboney —that this form of expression* can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the State can regulate or prohibit." *Id.*, at 296-97. (emphasis added).

Second, even if *Giboney* did stand for the proposition that pure speech is enjoniable when it is an essential part of an integrated course of conduct, such a holding would have no application to the circumstances of the instant case. There is no finding by either court below in this case that any activities involving expression, except picketing, were essential to or even part of any integrated plan.

In fact, the decision in *Giboney* and the decision by the Court of Appeals below are similar. In each, the court found that picketing was being utilized to achieve what it considered to be an illegal object. In neither did the court find pure speech activity, carried on away from the site of the picketing to have been essential to

achievement of the proscribed object. In each, the court permitted an injunction to stand which extended to picketing or picketing plus placard carrying. Thus the decision of the Court of Appeals in this case is consistent with decision of this Court in *Giboney*.

The question presented by the Petitioners under Rule 23 of the Rules of the Supreme Court as the ground upon which writ of certiorari ought to be granted in this case was "Whether the Learned Court below decided a federal question in a way in conflict with prior applicable decisions of this Court below decided a federal question in a way in conflict with prior applicable decisions of this Court." In support of this position they cite *Douds* v. *Local 1250*, 170 F. 2d 700 (2d Cir. 1948), from which no appeal was taken to this Court. Assuming arguendo that there was a conflict between the decision of the Court of Appeals in *Douds* and the Court of Appeals in the case at bar, the Respondents submit such a conflict is not a "subsidiary question fairly comprised" in the question stated, and that this Court should therefore refuse to consider it consistent with the dictates of subsection (c) of Rule 23.

In any case the injunction issued in *Douds* enjoining pure speech activity is clearly unconstitutional under principles affirmed by this Court in every case cited by the Petitioners and Respondents. Regardless, the decision in *Douds* is plainly distinguishable from that reached in this case. Contrary to the findings herein, in *Douds* the court found that free speech activities other than picketing had been utilized to prevent employees from working. *Douds*, at 699.

Indeed had not the court in *Douds* made such a finding, upholding the injunction issued in that case would

have been in outright conflict with mandatory principles of construction established by this Court. As stated in *Labor Board* v. *Express Publishing Co.*, 312 U.S. 426, 436 (1941):

> "This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are dissociated from those which a defendant has committed. *Swift & Co.* v. *United States*, 196 U.S. 375; *New York, N.H. & Hr. Co.* v. *United States* v. *Interstate Commerce Comm'n.*, 200 U.S. 361, 404, and see under the National Labor Relations Act, *National Labor Relations Board* v. *Swift & Co.*, 108 F. 2d 985.

Further, the injunction in *Douds* was drawn with far greater specificity than the all embracing one issued by the District Court in this case. On that ground alone, under the holdings of *Walker*, *Robel* and *Carroll* it is distinguishable from the case herein.

In sum, in their petition for a writ of certoirari, the Petitioners misinterpret the basis of the decision of the Court of Appeals remanding the case to the Southern District Court and requiring modification of the injunction issued in this case. Petitioners suggest that the Court of Appeals held that all forms of expression, except picketing or force, are, under all circumstances, immune from injunction under the First Amendment. Rather, the Court held that when injunctive relief is granted, particularly where such relief is preliminary, it must be tailored to restrain no more than what is reasonably required to accomplish its ends. In the context of the particular facts of this case, the Court found that short of picketing and employing violence, the respondents should not be restrained from expres-

sing their views, and that upon the record and findings herein, the injunction issued by the District Court prohibiting more than picketing and violence was overbroad and in addition, vague. *Schenck*, *Adderly*, *Konigsberg*, *Giboney* and *Douds* dictate no other course of action.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari prayed for should be refused.

Respectfully submitted,

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APPENDIX

[33] * * *

II. The Orders of the Courts Below Did Not Violate the First Amendment Rights or Any Other Rights of the Disabled Miners, Widows et al. or Other Pickets.

The uncontradicted facts as proved by the evidence *and specifically found by Judge Christie* (267a) in these cases clearly establish that the picketing activity engaged in by the disabled miners, widows et al. was not a mere exercise of free speech.

The avowed purpose of the picketing was to "turn off the lights" of the entire country, and the means of achieving this end was by picketing coal mines, thereby halting production and the interstate movement of bituminous coal to electrical generating plants. (326a-327a; 333a; 354a-355a). The disabled miners, widows et al. were fully aware of the tradition among coal miners of not crossing picket lines at mines, and, relying upon this fact with the additional coercive threat of violence to effectuate their plan, the pickets were placed at or near the entrances to mines and were successful in closing down the mines. (260a; 265a-266a; AA, p. 12). Such activity as conducted by the disabled miners, widows et al. cannot be protected by the First Amendment because speech can never be viewed in the abstract, completely divorced from the surrounding circumstances. Therefore the activity of the pickets must be viewed in the context in which it occurred. As stated above, the pickets knew that their activity would stop the production of coal; in fact they relied upon this to achieve their goal of bringing pressure on the Trustees of the Fund. Thus it would be a gross

abuse of justice to allow them to take refuge in the First Amendment to protect them for their wilful, intentional and unlawful acts.

* * *

[35]

Furthermore, in these cases presently before the Court, the disabled miners, widows et al. were fully aware of the effect of picketing a mine. As discussed above, United Mine Workers will not cross a picket line, and the disabled miners, widows et al, relied upon this to effectuate their plan to stop the production of coal.

* * *